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IN THE

Supreme Court of the United States

October Term, 1992

LEE ALEXANDER,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether the Tax Court retains jurisdiction to vacate its prior decision, following affirmation of that decision by the Court of Appeals and before the time to file a petition for a writ of certiorari to this Court has expired.

2. Whether the Court of Appeals may decide issues not addressed by the decision of the Tax Court, namely timeliness or the merits of the case.

3. Whether the Tax Court may relieve a taxpayer from summary judgment, resulting from extraordinary circumstances, so as to allow the taxpayer to present his case on the merits.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

LEE ALEXANDER,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Lee Alexander respectfully requests that a writ of certiorari issue to review judgments of the United States Court of Appeals for the Second Circuit entered on January 30, 1992 and April 3, 1992.

Opinions Below

The decision of the Tax Court, *Alexander v. Commissioner*, Nos. 17429-88, 17431-88 (June 27, 1990), granting summary judgment, is annexed in the Appendix here to at A1. The opinion of the United States Court of Appeals for the Second

Circuit, on the first appeal, *Alexander v. Commissioner*, 926 F.2d 197 (Feb. 15, 1991) (Alexander I), affirming the aforesaid decision of the Tax Court, is annexed in the Appendix hereto at B1. The order of the Tax Court, Nos. 17429-88, 17431-88 (May 23, 1991), dismissing Petitioner's motions for reconsideration, is annexed in the Appendix hereto at C1. The opinion of the Court of Appeals affirming the aforesaid order of the Tax Court, *Alexander v. Commissioner*, No. 91-4133 (Jan. 30, 1992) (Alexander II) is annexed in the Appendix at D1. The order of the Second Circuit Court of Appeals (Apr. 3, 1992), denying a petition for rehearing *en banc*, appears in the Appendix at E1.

Statement of Jurisdiction

Jurisdiction of the Petition for redetermination of deficiency is in the Tax Court under 26 U.S.C. 6213(a) and general jurisdiction is vested in the Tax Court under 26 U.S.C. 7442. Under 26 U.S.C. 7482(a)(1), the United States Courts of Appeals (other than the Federal Circuit) have jurisdiction to review the decisions of the Tax Court, subject to review by the Supreme Court upon Certiorari.

Statement of the Case

The U.S. Internal Revenue Service notified Petitioner by a letter dated April 12, 1988 that it was claiming deficiencies of over $660,000, plus penalties and interest, for the taxable years 1979 through 1986. On July 11, 1988, Petitioner's counsel filed petitions with the Tax Court contesting the deficiencies and penalties. The Commissioner answered the petitions (later consolidated into one docket) on September 8, 1988. On March 15, 1989, the Commissioner served Petitioner's counsel with a Request For Admissions pursuant to Tax Court Rule 90. On May 19, 1989, the Commissioner moved for summary judgment, based primarily on the matters deemed admitted as

a consequence of the failure of Petitioner's Counsel to respond to the Request For Admissions by the Commissioner.

Petitioner's counsel filed objections to the motion in the form of unsworn statements, signed only by counsel, on August 14, 1989. The Tax Court subsequently granted summary judgment to the Commissioner, without further proceedings on June 27, 1990.

Petitioner's counsel appealed the summary judgment to the Second Circuit Court of Appeals and the decision was affirmed on February 15, 1991. On April 29, 1991, Petitioner, pro se, moved the Tax Court pursuant to Tax Court Rule 162 for leave to vacate (and, if granted, to vacate) the summary judgment entered June 27, 1990 and also moved for leave to withdraw counsel and to allow Petitioner to proceed pro se under Tax Court Rule 24(b) and (c). The Commissioner did not respond to the motions. The Tax Court denied both motions on May 23, 1991.

Petitioner timely appealed the decision of the Tax Court to the Second Circuit Court of Appeals, which affirmed the decision on January 30, 1992 and denied his petition for rehearing on April 3, 1992.

Statement of Facts

Petitioner was Mayor of the City of Syracuse, New York from January 1, 1970 to December 31, 1985. He was indicted in 1988 for receiving money from persons doing business with the city during the tax years 1979 through 1986. Petitioner did not include these sums in his income tax returns for those years. Petitioner pled guilty to tax evasion charges for the 1985 taxable year and to racketeering and obstruction of justice charges.

Petitioner also turned over to the government $1.3 million he was accused of illegally receiving, plus $100,000 in interest. The 1988 Notices of Deficiency issued by the Internal Revenue Service Commissioner were based upon these sums.

Petitioner's Rule 162 motion to the Tax Court in the instant proceedings was based on his counsel's untruthful statements to Petitioner that: (1) no pleadings had been served on him during the period of March 15, 1989 to July 10, 1989; and (2) a response to the Request For Admissions was not due until August 11, 1989, when in fact it had been due on April 15, 1989; that at all relevant times he was mentally ill and incarcerated one thousand miles distant from his counsel .

Petitioner submitted uncontested sworn statements in support of his Rule 162 motion showing also that at all relevant times he had spoken on the telephone with his counsel weekly and had inquired at least twice each month about the status of the Tax Court proceeding, and specifically inquiring about discovery proceedings.

At the time counsel first sent the Request For Admissions to Petitioner, the time to respond had already expired, but counsel's cover letter to Petitioner asserted that responses were not due for 30 days when in reality the responses were already past due by 4 months.

Counsel consistently assured Petitioner that he was "on top of the case. . ." "that his office had a very sophisticated tickler system . . ." "that his office never missed a deadline . . ." "that he was in compliance with all court orders . . ." to "stop worrying . . . no one can touch your pension . . . you've got a big chunk coming back."

Petitioner's uncontested sworn statement further alleged that when he was told by his counsel that summary judgment

had been granted, he instructed his counsel in July of 1990 to move the Tax Court to vacate the judgment, but that his counsel, without informing Petitioner, instead filed a Notice of Appeal to the Second Circuit Court of Appeals.

Petitioner's Rule 162 affidavit stated that when he was informed of the filing of the Notice of Appeal, he was told by his counsel that the summary judgment decision was "clearly erroneous" and that the Court of Appeals would "surely reverse." Petitioner thereafter instructed his counsel to explain to the Court of Appeals the sequence of events presented above.

Petitioner's counsel ignored these instructions as well. Petitioner was not informed by his counsel until March 7, 1991 that the Court of Appeals had affirmed the summary judgment on February 15, 1991. Repeated requests by petitioner to his Counsel to obtain a copy of the appellate court opinion were stalled by his counsel; a copy was finally obtained directly from the clerk of the appellate court on April 6, 1991.

Petitioner filed the subject motions, *pro se*, with the Tax Court three weeks later on April 29, 1991. The Tax Court denied both motions with a single order dated May 23, 1991, averring that:

> The entry of decisions herein granting summary judgment in favor of respondent was appealed by petitioner—and the decisions of the court were affirmed by the United States Court of Appeals for the Second Circuit on February 15, 1991.

Petitioner appealed the decision of the Tax Court to the Court of Appeals for the Second Circuit. The Court affirmed the decision of the Tax Court in an unpublished opinion, holding that:

Alexander makes no allegations of fraud on the Tax Court. *See Senate Realty Corp. v. Commissioner,* 511 F.2d 929, 931 & n.1 (2d Cir. 1975) (Tax Court may vacate a final judgment where it was procured through fraud). At most, Alexander has alleged that he was deceived or defrauded by his counsel Boreanaz. *Cf. Monjar v. Commissioner,* 140 F.2d 263, 265 (2d Cir. 1944) (no jurisdiction in Tax Court to vacate default judgment despite "unfortunate reliance of the taxpayer upon counsel"). Moreover, Alexander's allegations in support of his motion were unsubstantiated. Finally, Alexander's motion was untimely. *See* Rules of Prac. & Proc. of the United States Tax Court, 26 U.S.C. app. Rule 162 (1988). Under these circumstances the Tax Court was well within its discretion in denying Alexander's motion. *See Senate Realty,* 511 F.2d at 931.

We have considered appellant's remaining arguments and find them to be without merit.

AFFIRMED.

I.

The Second Circuit is in conflict with the First Circuit as to whether a motion to vacate a decision of the Tax Court can be filed in the Tax Court after its affirmation by the Court of Appeals and before the time to file petition for certiorari to this Court has expired.

Although the Commissioner convinced the Second Circuit Court of Appeals in the instant case that the decision of the Tax Court became final following affirmation by the appellate court, the Commissioner contended otherwise in the First Circuit Court of Appeals, *Hanover Ins. Co. v. U.S.*, 880 F.2d 1503 (1st Cir. 1989). In *Hanover,* the Commissioner sought to

recover alleged deficiencies in tax payments by an insurance company. The company contested the alleged deficiency in the Tax Court, which reduced the deficiency. After the First Circuit Court of Appeals affirmed, the company filed a petition for certiorari with this court, which was denied. The Commissioner subsequently filed an assessment on July 23, 1980.

At this point the insurance company contended that the assessment was untimely under 26 U.S.C. 6501, which provides that the Internal Revenue Service has three years to assess taxes after a return is filed, subject to the suspension of the running of such period during a proceeding for a deficiency and "until the decision of the Tax Court becomes final [ ], and for 60 days thereafter." *Id.* at 1505. The company contended that the period of assessment expired 60 days after the Tax Court's decision became final, which was 60 days after the company's petition for certiorari was denied by this court. *Id.* The Commissioner, taking the position of the petitioner in the case at bar, argued that its July 23, 1980 assessment was timely because the Tax Court's decision was not final for the purposes of 26 U.S.C. 7481 until the decision of the Tax Court could not be altered by the Supreme Court through an application for reconsideration of its denial of a writ of certiorari.

The First Circuit adopted the Commissioner's position, averring that:

> Courts have nearly unanimously, albeit somewhat sporadically, interpreted the statutory provision to mean that a decision of the Tax Court becomes final only when, as a practical matter, it has become unalterable, *Kenner v. Commissioner,* 387 F.2d 689, 690-91 (7th Cir.), *cert. denied,* 393 U.S. 841, 89 S.Ct. 121, 21 L.Ed.2d 112 (1968); that is, when the courts no longer possess power to reopen the matter . . . *See, e.g., Lasky*

v. Commissioner, 235 F.2d 97, 98-99 (9th Cir. 1956), *aff'd* 352 U.S. 1027, 77 S.Ct. 594, 1 L.Ed.2d 598 (1957); *White's Will v. Commissioner,* 142 F.2d 746, 748-49 (3d Cir. 1944); *Monjar v. Commissioner,* 140 F.2d 263, 265 (2d Cir. 1944); *McCarthy v. Commissioner,* 139 F.2d 20, 21-22 (7th Cir. 1943); *Denholm & McKay Co. v. Commissioner,* 132 F.2d 243, 246-47 (1st Cir. 1942); *Sweet v. Commissioner,* 120 F.2d 77, 79-81 (1st Cir. 1941). *Id.* at 1506.

* * *

And while this may well be a case of first impression in the sense that the exact issue which is before us has never been the concern of the narrowest reading of the *ratio decidendi* of a court's decision, we find the path to be well lit and the outcome adumbrated by what has gone before. Congress's discernible vision, along with the clarity and consistency of the language employed by the Supreme Court in its relevant decisions, compels us to elect the government's interpretative candidate. *Id.*

* * *

. . . [c]ourts have long reasoned that Congress intended "final," as used throughout what is now section 7481, to mean 'that at the indicated point of time the decision of the [Tax Court] must stand as rendered, *without power . . . in the courts to modify it thereafter.' Sweet,* 120 F.2d at 81 (emphasis supplied); *see also Kenner,* 387 F.2d at 690 ('Finality accrues promptly after the exhaustion of the possibilities of direct review'); *Claremont Waste Mfg. Co. v. Commissioner,* 238 F.2d 741, 744 (1st Cir. 1956) ('final in this connection means final in an absolute and literal sense;

> at the indicated point of time tax consequences of the decision by the Tax Court becomes irrevocably fixed . . . without power in the Tax Court or in any other court to modify it thereafter'). Given the precedential trail, continuing to define finality in this way advances congressional intent, rather than undermining it. *Id.* at 1508.

In the instant case, this court had the power to modify or reverse the decision of the Tax Court within 90 days of the decision of the Court of Appeals (until May 15, 1991) and within 25 days thereafter throughout the rehearing process (June 9, 1991). Petitioner filed his motion for leave to file a motion in the Tax Court on April 30, 1991, 40 days before the expiration of the power of a court to modify or reverse the decision of the Tax Court. Thus, the motion by this taxpayer was filed before the decision of the Tax Court became final.

Petitioner next turns to the balance of the decision, namely the conclusion by the appellate court that Petitioner's motion was untimely and lacked substantiation. Since the standard of review for the Court of Appeals on these issues is abuse of discretion, and since the Tax Court did not exercise its discretion with a finding on either issue, the Court of Appeals was without jurisdiction to decide either issue. *See Commissioner v. McCoy*, 484 U.S. 3, 98 L.Ed.2d, 108 S.Ct. 217, *reh. den.* 484 U.S. 982, 98 L.Ed.2d 495, 108 S.Ct. 496 (1987):

> Under 26 U.S.C. 7482(a) . . . the regional Federal Courts of Appeals have jurisdiction to review decisions of the Tax Court 'in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.' Section 7482(c)(1) provides that 'such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or reverse the decision of the Tax

> Court.' It follows that in reviewing a Tax Court decision, the duty of the Court of Appeals is to consider whether the Tax Court committed error. Plainly, the Court of Appeals lacks jurisdiction to decide an issue that was not the subject of the Tax Court proceeding or to grant relief that is beyond the powers of the Tax Court itself . . . [The Court of Appeals] was not empowered to proceed further to decide other questions relating to interest and penalty-questions that were not presented, and could not possibly have been presented, to the Tax Court-or to grant relief that the Tax Court itself had no jurisdiction to provide. 98 L.Ed.2d at 6-7. (emphasis added)

For the purpose of the motion, courts have traditionally treated the allegations of movant's affidavits as true. In the instant case, petitioner's affidavit was not challenged in the Tax Court. An evidentiary hearing will enable petitioner to present further evidence of the extraordinary circumstances that prevented him from presenting his case on the merits.

Untimely post-decision motions for reconsideration filed in the Tax Court were deemed by appellate courts in *Wilson v. C.I.R.*, *LaBow v. C.I.R.*, and *U.S. v. Cirami, infra* at Section III, as acceptable for reasons similar to those found in the case at bar.

II.

The decisions of the courts below are erroneous as a matter of law

Having addressed the issue of finality in the preceeding section, petitioner now addresses the conclusion implicit in the decisions of the courts below that petitioner's motion for

reconsideration is barred under the doctrine of the law-of-the-case. In *U.S. v. Cirami, supra,* the Second Circuit explicated the doctrine of law-of-the-case and also addressed the issue of relief for a blameless client aggrieved by the behavior of his attorney. In *Cirami,* the court explained that a motion to the trial court following affirmation of its decision by the Court of Appeals is not necessarily barred by the doctrine of law-of-the-case:

> [F]rom the proposition that the trial court must adhere to the decision and mandate of the appellate court there is the corollary that . . . the trial court may consider matters [on a new motion to vacate the judgment] not expressly or implicitly part of the decision of the court of appeals. 563 F.2d at 33.

In the instant case, Petitioner seeks to vacate a judgment previously upheld by the Second Circuit. Law-of-the-case doctrine bars reconsideration of that decision *if and only if* the issues raised in Petitioner's Rule 162 motion were expressly or implicitly decided by the court in Alexander I.

The issue raised by petitioner in his Rule 162 motion was whether extraordinary circumstances justify vacation of the June 27th summary judgment decision. The decision by the Court of Appeals in *Alexander I* was based on inexcusable negligence of petitioner's counsel. In fact, the Court of Appeals emphasized that the extraordinary circumstances, some of which were presented by unsworn allegations of counsel, might have justified relief if they had been presented upon a proper motion to the Tax Court prior to appeal, and which would have resulted in a reviewable record. The comparison between *Cirami* and the instant case is compelling.

The Second Circuit in *Cirami* also explained why, in circumstances similar to those in the instant case, the district

court's refusal to consider Cirami's second motion was an abuse of discretion:

> In our earlier decision in this case, we did not hold that Rule 60(b) relief was *under no circumstances* available to the Ciramis. Rather, we held that the arguments there urged by the Ciramis were quite insufficient to justify the relief they sought in that we were 'totally uninformed of the reasons' for their default. 535 F.2d at 739. The papers now submitted constitute a new motion and seek both to remedy that deficiency and to explain its cause. In affirming the denial of the Ciramis' first motion, we did not pass on the contention in the second motion, for they were not before us. Thus, consideration of them by the district court would not have been improper. 563 F.2d at 33 (emphasis added).

Two and one-half months after the Second Circuit decision in *Cirami I*, the taxpayers presented evidence to the district court of counsel's deceit, and their own diligence, and moved to vacate the previously upheld judgment. The court in *Cirami II* then reversed the district court's second refusal to vacate the judgment on the grounds explicated above. The facts of the case at bar should have dictated a similar holding by the Second Circuit Court of Appeals.

III.

It was error for the Second Circuit not to reverse and to remand to the Tax Court for an evidentiary hearing to permit petitioner to present further evidence of the extraordinary circumstances that prevented petitioner from presenting his case on the merits.

The extraordinary circumstances set out by Petitioner herein have been widely recognized by various circuit courts as justifying relief.

The Fourth Circuit Court of Appeals in *Hillig v. C.I.R.*, 916 F.2d 171 (1990), vacated the Tax Court's dismissal of taxpayer's petitions for counsel's failure to comply with an order to compel production of documents. The court concluded:

> While the power to dismiss clearly lies with the district courts, it is appropriately exercised only with restraint. 'Against the power to prevent delay must be weighed the sound public policy of deciding cases on their merits.' *Id.* at 173.
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> * * *
>
> A dismissal sanction is usually inappropriate when it unjustly penalizes a blameless client for the attorney's behavior. See *Dove v. Codesco*, 569 F.2d 807, 810 (1978); *McCargo v. Hedrick*, 549 F.2d 393, 396 (4th Cir. 1976); *Reizakis v. Loy*, 490 F.2d 1132, 1135 (4th Cir. 1974); *see also Shea v. Donahue Const. Co.*, 795 F.2d 1071, 1077-79 (D.C. Cir. 1986). *Id.* at 174
>
> * * *
>
> There is no evidence in the record of bad faith . . . the circumstances of this case do not merit the harsh sanction of dismissal for failure to comply with a discovery order . . . We hold only that sanctions should not have been imposed on the taxpayers. Therefore, we vacate the judgment of dismissal and remand for reinstatement of the case. Also, the Tax Court may consider imposing sanctions on taxpayers's counsel. *Id.* at 175.

See also In Re Virginia Information Systems Corp., 932 F.2d 338, 342 (4th Cir. 1991) ("Of course, attorney malfeasance which actively misleads a client or is comparably culpable

might successfully ground a Rule 60(b) motion.") It should be noted that the courts have held that decisions interpreting Rules 59 and 60 of the Federal Rules of Civil Procedure apply to motions for reconsiderations and further trial proceedings under Rule 161 of the Rules of the United States Tax Court. *Estate of Kraus*, 875 F.2d 597, 602 (7th Cir. 1989).

The District of Columbia Court of Appeals in *Jackson v. Washington Monthly Co.*, 569 F.2d 119, 122 (1977), also refused to allow a district court to punish a client for his lawyer's negligence. The court reversed the district court's denial of a Rule 60(b) motion, stating:

> From the showing now made by the appellant, it appears that his lawyer might not only have been grossly rather than just mildly negligent toward his client, but that he might also have misled the client by assuring him that the litigation was continuing smoothly when in fact it was suffering severely from lack of attention. These reassurances may even have continued long after the litigation, to the lawyer's knowledge, had already been aborted. And it seems that appellant may not have known the extent of such dilatory and deceptive conduct until after the case arrived in court.

In *Fuller v. Quire*, 916 F.2d 358 (6th Cir. 1990), plaintiff's suit was dismissed when his attorney failed to make a court appearance. After the district court reinstated plaintiff's action, defendant appealed to the Sixth Circuit. The Court of Appeals affirmed the district court's decision, noting that plaintiff had made repeated efforts to find out the status of his case from counsel and there was no demonstration of undue prejudice to defendant. The court averred:

> The trial court properly granted relief from the judgment in order to avoid penalizing plaintiff, who dis-

> played reasonable diligence in attempting to discover the status of his case, for the inexcusable misconduct of his attorney. *Id.* at 361.

The Fifth Circuit Court of Appeals in *Crandall v. C.I.R.*, 650 F.2d 659, 660 (1981), reversed the Tax Court's dismissal of a taxpayer's action contesting a tax deficiency for failure to file a proper petition and filing fees. The court stated:

> . . . we have no history of delay or contumacious conduct by the appellant [taxpayer]. There is only a three month period of inactivity on the part of the appellant. There was no repeated failure to comply with Tax Court orders. There were no repeated warnings that appellant was risking dismissal . . . Accordingly, we remand to the Tax Court to give the taxpayer the opportunity to present evidence of his excuse and to give the Tax Court the opportunity to make findings as to whether dismissal is justified.

In the case at bar, the Second Circuit held that there is no "jurisdiction in Tax Court to vacate default judgment despite unfortunate reliance of the taxpayer upon counsel," citing a 1944 Second Circuit decision, *Monjar v. C.I.R.*, 140 F.2d 263, 265. In reaching back nearly half a century to *Monjar*, the Court of Appeals retreated from clear precedent that has evolved subsequent to *Monjar* involving circumstances similar to the instant case, holding for the taxpayer. *See Wilson v. C.I.R.*, 500 F.2d 645 (2d Cir. 1974) (Tax Court, having accepted the untimely filing of the motion to vacate by taxpayer, was obliged to consider all relevant facts and law and to exercise sound discretion in either granting or denying the motion); *LaBow v. C.I.R.*, 763 F.2d 125 (2d Cir. 1985) (Taxpayer's motion to vacate, which presented new evidence to Tax Court in an untimely post-trial motion for reconsideration, should not have been denied by Tax Court and said denial was an abuse of discretion).

In the case at bar, the Tax Court chose to penalize the taxpayer, and not the attorney, for the attorney's behavior. By doing so, the Tax Court precluded the taxpayer from presenting evidence on the merits showing that the funds being charged to the taxpayer were funds raised for political purposes, (albeit secretively and frequently tied to percentages) and were not chargeable to the taxpayer until he appropriated them as his own when he retired from public office. See *McCormick v. U.S.*, ____ U.S. ____, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991).

As a result of the Tax Court's decision to penalize the taxpayer and not the attorney, the Commissioner has seized the taxpayer's $18,000 a year pension and $30,000 from his life insurance, leaving a tax balance of hundreds of thousands of dollars in tax liens to be collected from social security payments. The Court of Appeal's angry rebuff of petitioner's counsel in the proceedings below demonstrate that the imposition of sanctions directly against counsel would be the most appropriate remedy in the instant case. The court stated:

> It is not the role of appellate courts to make allowances for the patent disregard of clearly stated trial court rules that are in part designed to provide for the expeditious conclusion of litigation. Moreover, although Alexander's incarceration or medical care might have been regarded as cause for some delay upon the proper motion, counsel's belated, unsworn and conclusory assertions fail to detail the efforts made to respond to the requests and why they failed. *Alexander v. C.I.R.*, 926 F.2d at 199.

The Third Circuit Court of Appeals decision in *Carter v. Albert Einstein Medical Center*, 804 F.2d 805 (1986) strongly tracks the case at bar and demonstrates the appropriateness of penalizing counsel, and not an innocent client, for an attor-

ney's delicts in representation. In that case, plaintiff's complaint for wrongful termination was dismissed by the district court because of plaintiff's counsel's failure to comply with a discovery order. After a motion to reinstate the complaint by plaintiff's attorney was denied, plaintiff, acting *pro se*, filed a motion for reconsideration and for dismissal of his attorney, which was denied by the district court.

In reversing, the Third Court empathized with the district court judge's frustration with the "inexcusable conduct" of plaintiff's lawyer, which had frustrated the court's efforts to expedite its docket. The court concluded, however, that in the absence of personal responsibility of a client for his attorney's actions, the most appropriate measure was not dismissal of the innocent party's case, but rather sanctions against the attorney. *Id.* at 807.

The Third Circuit in *Carter* traversed the landscape, and in the process erased the barrier, presumed by some courts to have been imposed by this Court's decision in *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), to relief for a client aggrieved by his attorney's delicts in prosecuting a case. The court concluded:

> Although the Court [Supreme Court] declared a party to be bound by his counsel's acts, it noted that the aggrieved party never availed himself of a corrective remedy such as the 'escape hatch' provided by Rule 60(b). *Id.* at 632, 82 S.Ct. at 1390. Link did not decide whether it would have been an abuse of discretion to deny a Rule 60(b) motion, since none had been filed. *Id.* at 635-36, 82 S.Ct. at 1391-92. Compare *Link* with *Boughner*, 572 F.2d at 978, which held that under its particular facts, appellants were not bound by their attorney's actions for the purpose of Rule 60(b). 804 F.2d at 807.

The *Carter* court also concluded that a client action for malpractice was a decidedly inferior mechanism from the standpoint of protecting the client's interests or those of the general public:

> Although an action for malpractice is a possibility when a lawyer's negligence results in dismissal, that remedy does not always prove satisfactory. It may be difficult for the client to obtain and collect a judgment for damages. Perhaps more importantly, public confidence in the administration of justice is weakened when a party is prevented from presenting his case because of the gross negligence of his lawyer who is, after all, an officer of the court. As we pointed out in *Poulis*, this remedy 'would multiply, rather than dispose of litigation.' 747 F.2d at 867. We think it critical that the importance of an attorney's professional responsibility for his client's interest be brought home to the erring lawyer quickly and unmistakably. Allowing derelictions to await possible punishment through lengthy malpractice litigation or disciplinary board proceedings is not likely to be effective in deterring future misconduct. Consequently, we do not favor dismissal of a case when the attorney's delinquencies—not the clients—necessitate sanctions. *Id.* at 808.

Consequently, the court held that plaintiff had acted reasonably in pressuring his lawyer to file a Rule 60(b) motion prior to taking action himself. The court held that the complaint should be reinstated by the district court and plaintiff should be afforded reasonable time to secure new counsel or prepare to proceed *pro se*. *Id.* Such a finding in the case at bar would also further the interests of justice assayed in the *Carter* decision.

Conclusion

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Dated: June 15, 1992
Rochester, MN

Respectfully submitted,

LEE ALEXANDER, *Pro Se*
Petitioner
Rochester Federal Medical Center
02365-052 P.M.B. 4600
Rochester, MN 55903-4600

APPENDIX

Opinion of the United States Tax Court Granting Summary Judgment

T. C. Memo 1990-315

UNITED STATES TAX COURT

LEE ALEXANDER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket Nos. 17429-88, 17431-88.

Filed June 25, 1990.

Harold J. Boreanaz, for the petitioner.

Edward D. Fickess, for the respondent.

Memorandum Findings of Fact and Opinion

Dawson, Judge: These cases were assigned to Special Trial Judge Peter J. Panuthos for consideration and ruling on respondent's motion for summary judgment filed herein.[1] The Court agrees with and adopts the Special Trial Judge's opinion, which is set forth below.

Opinion of the Special Trial Judge

PANUTHOS, Special Trial Judge: These cases are before the Court on respondent's motions for summary judgment pursuant to Rule 121. They were consolidated for purposes of the opinion herein.

Respondent determined deficiencies in and additions to petitioner's Federal income taxes as follows:

Docket No.	Year	Deficiency	Addition to Tax Sec. *6653(b) (1)	Addition to Tax Sec. 6653(b) (2)	Addition to Tax Sec. 6661
17431-88	1979	$ 83,726	$41,863		
	1980	$ 59,791	$29,896		
	1981	$ 90,839	$50,814		
	1982	$102,281	$51,140	50% of the interest due on $102,281	$25,570
	1983	$102,496	$51,248	50% of the interest due on $102,496	$25,624
	1984	$ 64,505	$32,252	50% of the interest due on $64,505	$16,126
	1985	$123,403	$61,701	50% of the interest due on $123,403	$30,851
17429-88	1986	$ 40,640	**$30,480	50% of the interest due on $40,640**	$10,160

* For the taxable years 1979, 1980, and 1981, this addition to tax is designated sec. 6653(b).

[1]These cases were assigned pursuant to section 7443A and Rule 180. All section references are to the Internal Revenue Code, as amended and in effect for the years in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

** For the taxable year 1986, this addition was designated as secs. 6653(b)(1)(A) and (b)(1)(B).

Respondent's motion for summary judgment raise the following issues:

(1) Whether petitioner received illegal income in the form of payoffs and bribes;

(2) Whether petitioner is liable for additions to tax for fraud; and

(3) Whether petitioner is liable for additions to tax for a substantial understatement of liability within the meaning of section 6661 for the taxable years 1982 through 1986.

Procedural Background

Timely petitions were filed on July 11, 1988. At the time of filing the petitions herein, petitioner resided at Syracuse, New York. The petitions in both dockets were executed by petitioner's counsel, Harold J. Boreanaz. Respondent's answers were timely filed on September 12, 1988. In his answers, respondent makes affirmative allegations with respect to the issues of fraud, collateral estoppel, and the statute of limitations. While petitioner initially failed to file a reply in each docket, after a notice of filing of respondent's motion for an order under Rule 37, the Court permitted petitioner's replies to be filed on January 3, 1989.

On March 27, 1989, respondent's requests for admissions were filed with the Court in each docket. The request for admissions in each docket is 53 pages long containing numerous detailed requests concerning omitted income. According to the certificates of service attached to respondent's requests for admissions, said documents were served on petitioner's counsel by mailing same on March 15, 1989. No

response was filed by petitioner to respondent's requests for admissions.

On May 19, 1989, respondent's motions for summary judgment were filed in each docket. In his motions, respondent asked that the Court sustain the deficiencies and additions to tax set forth in his notices of deficiency. Respondent relies on deemed admissions in these cases. Petitioner's objections to respondent's motions were filed on August 14, 1989. Petitioner's counsel argues that he was unable to respond to the requests for admissions for the following reasons:

(1) The health and location of petitioner made it virtually impossible to communicate with him;

(2) The scope and volume of information required was overwhelming; and

(3) The lack of access to numerous records.

Findings of Fact

The Court finds the following facts based on this record, including the matters deemed admitted pursuant to respondent's requests for admissions.

Petitioner was the mayor of the City of Syracuse, New York, from January 1, 1970, through December 31, 1985. During the taxable years 1979 through 1986, petitioner conducted and participated in a pattern of racketeering activity to obtain money and property through illegal means. During the years in issue, petitioner received money from persons wishing to do business in and with the City of Syracuse, New York. Petitioner did not include the funds received on his Federal income tax returns for the years in issue.

Petitioner took affirmative steps to conceal the unlawful receipt of money and property as a result of his illegal scheme. Kickbacks were made to petitioner in various forms, including

but not limited to, cash, municipal bearer bonds, gold coins, and political contributions. During the years in issue, petitioner used the services of several associates or agents to act as "bagmen" who served the purpose of collecting some of the kickback payments. During the years in issue, petitioner attempted to conceal his illegal activities and the proceeds thereof by utilizing safe deposit boxes held in other persons' names to store portions of the illegal proceeds. During the years in issue, petitioner attempted to conceal his illegal activities by causing the purchase of municipal bearer bonds and the redemption of interest coupons in ways intended to disguise the true nature of the transactions and the sources of the funds. The total amounts of illegal payments received by petitioner for the years in issue and sources of such payments are as follows:

Exhibit A

Source	1979	1980	1981	1982	1983	1984	1985	1986
Gregory D. Ferentino	$ 17,500.00	$ 31,293.12	$ 88,331.35	$ 43,400.00	$ 66,000.00	$ 30,700.00	$ 4,000.00	$ ---
Christ J. Lemonides	$ 20,224.32	$ 16,468.82	$ 7,200.00	$ 3,535.00	$ 1,600.00	$ 28,120.80	$ 4,319.00	$58,513.25
Ronald Ciricillo	$ ---	$ 4,700.00	$ 6,150.00	$ 4,700.00	$ 3,500.00	$ 7,000.00	$ 26,200.00	$ ---
Nicola L. Caruso	$ 70,100.00	$ ---	$ 5,500.00	$ 36,200.00	$ 8,000.00	$ 15,000.00	$160,700.00	$ 5,000.00
Eugene F. Bersani	$ 32,295.48	$ 52,121.49	$ 45,175.90	$ 54,532.10	$ 58,768.40	$ 57,957.97	$ 60,203.58	$18,813.98
James T. Spaulding	$ ---	$ ---	$ ---	$ 65,891.50	$ 67,065.90	$ ---	$ ---	$ ---
Totals	$140,119.80	$104,583.43	$152,357.25	$208,258.60	$204,934.30	$138,778.77	$255,422.58	$82,327.23

The aforementioned income received by petitioner was the result of kickbacks and other illegal activities. None of the income referred to was reflected on petitioner's Federal income tax returns for the taxable years in issue.

On January 4, 1988, petitioner pled guilty to tax evasion pursuant to section 7201 with respect to the taxable year 1985. On or about September 20, 1985, petitioner and Demosthenes Stathis made false statements and misrepresentations to Internal Revenue Service Agent Robert Berg with respect to the taxable years 1982 and 1983. Petitioner made further false statements to agents of respondent on or about October 23, 1985.

During the taxable years in issue, petitioner, aided and abetted by others, perpetrated an extortion scheme, either individually or collectively, to obtain money and other things of value.

Opinion

Rule 121 provides that a party may move for summary judgment upon all or part of the legal issues in controversy so long as there is no genuine issue of material fact. Rule 121(b) provides for summary adjudication if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials show that there is no genuine issue as to any material fact and a decision may be rendered as a matter of law. The burden of proving that there is no genuine issue of material fact is on the moving party. *Naftel v. Commissioner,* 85 T.C. 527, 529 (1985); *Espinoza v. Commissioner,* 78 T.C. 412, 416 (1982).

Here there is no issue of material fact. Since no response was filed with respect to respondent's requests for admissions, the allegations contained therein are deemed admitted under Rule 90(c). *Marshall v. Commissioner,* 85 T.C. 267 (1985); *Morrison v. Commissioner,* 81 T.C. 644 (1983).

The factual assertions in respondent's requests for admissions which have been deemed admitted set forth omitted income for each of the years in issue and support respondent's deficiency determinations. Accordingly, we conclude that there is no genuine issue of material fact with respect to the

deficiency determinations. Therefore, respondent is entitled judgment as a matter of law. *Marshall v. Commissioner, supra.*

With respect to the additions to tax for fraud, the burden of proof is on respondent to prove by clear and convincing evidence that an underpayment exists and that part of the underpayment of tax is due to fraud or the intent to evade tax. Sec. 7454(a); Rule 142(b); *Grosshandler v. Commissioner,* 75 T.C. 1 (1980); *Stratton v. Commissioner,* 54 T.C. 255 (1970). We have previously held that respondent's burden can be satisfied through facts deemed admitted under Rule 90(c). *Marshall v. Commissioner, supra;* see also *Doncaster v. Commissioner,* 77 T.C. 334 (1981) (a Court-reviewed opinion relating to facts deemed admitted under Rule 37[c]).

In his requests for findings of fact in each docket, which were deemed admitted, respondent clearly and convincingly established that petitioner, while the mayor of Syracuse, New York, participated in a pattern of conduct to obtain money and property through illegal means. During the taxable years 1979 through 1986, petitioner received illegal bribes and kickback payments which were not reported on Federal income tax returns for the years in issue. It has been deemed admitted that petitioner received kickbacks and illegal payments for the taxable years 1979 through 1986 as follows:

1979	$140,119.80
1980	$104,583.43
1981	$152,357.25
1982	$208,258.60
1983	$204,934.30
1984	$138,778.77
1985	$255,422.58
1986	$ 82,327.23

Based on the deemed admissions, it has further been clearly and convincingly established that there are underpayments in tax for the years 1979 through 1986 as follows:

Year	Deficiency
1979	$ 83,726
1980	$ 59,791
1981	$ 90,839
1982	$102,281
1983	$102,496
1984	$ 64,505
1985	$123,403
1986	$ 40,640

The deemed admissions establish a pattern of underreporting over an extended period of time which is indicative of fraud. *Holland v. United States*, 348 U.S. 121, 137 (1954); *Estate of Hill v. Commissioner*, 59 T.C. 846 (1973). Petitioner's dishonesty in business transactions and willingness to defraud others is also an indication of fraud. *Afshar v. Commissioner*, T.C. Memo. 1981-241, affd. without published opinion 692 F.2d 751 (4th Cir. 1982). The deemed admitted facts clearly and convincingly establish that for the taxable years 1979 through 1986 an underpayment of tax exists and that part of the underpayment is due to fraud or the intent to evade tax.

It is further noted that with respect to the taxable year 1985, petitioner pled guilty and was convicted of income tax evasion under section 7201. This conviction for 1985 was established, not only based upon the requests for admissions deemed admitted, but also on petitioner's admitting to such allegations in his reply to respondent's affirmative allegations in his answer. Accordingly, based on this record, petitioner is collaterally estopped from denying that the underpayment of tax for the taxable year 1985 is due to fraud within the meaning of

section 6653(b). *Amos v. Commissioner,* 360 F.2d 358, 359 (4th Cir. 1965), affg. 43 T.C. 50 (1964); *Arctic Ice Cream Co. v. Commissioner,* 43 T.C. 68 (1964).

With respect to the additions to tax under section 6661 for the taxable years 1982 through 1986, it is clear, based on respondent's requests for admissions which have been deemed admitted, that there is a substantial understatement within the meaning of section 6661(b)(2)(A). Accordingly, respondent's determinations with respect to such additions are sustained.

It is further clear that since we have found that a part of the underpayment of tax is due to fraud, the statute of limitations under section 6501(c)(1) is open for assessment of the deficiencies determined by respondent. *Vannaman v. Commissioner,* 54 T.C. 1011, 1018 (1970).

We note that in his objections to respondent's motions, petitioner's counsel raises matters that go to the question of the difficulty of responding to respondent's requests for admissions. We have previously held that, under Rule 90(c), affirmative action is required to avoid an admission. *Freedson v. Commissioner,* 65 T.C. 333 (1975), affd. on another issue 565 F.2d 954 (5th Cir. 1978). Here neither petitioner nor his counsel filed answers, objections, or anything in response to the requests for admissions. Rule 90 clearly contemplates that a party's failure to respond to a request will result in the statement being deemed admitted without further order of the Court. *Morrison v. Commissioner, supra* at 647. If petitioner required more time to respond to the requests for admissions, he could have sought an enlargement of time under Rule 90(c) or, even after the requests were deemed admitted, he could have sought withdrawal or modification under Rule 90(e). *Morrison v. Commissioner, supra* at 646, 647. Petitioner failed to pursue any of these remedies.

Petitioner has presented virtually no defense to respondent's motions for summary judgment. Based on the foregoing, respondent's motions for summary judgment will be granted in each docket.

An order and decision will be entered for the respondent in each docket.

A11

UNITED STATES TAX COURT
Washington, D.C. 20217

LEE ALEXANDER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 17431-88

ORDER and DECISION

Pursuant to the determination of the Court as set forth in its Memorandum Opinion (T.C. Memo. 1990-315) filed June 25, 1990, it is

ORDERED that respondent's motion for summary judgment filed on May 19, 1989, is hereby granted; and it is further

ORDERED AND DECIDED that there are deficiencies in and additions to petitioner's Federal income taxes as follows:

		Additions to Tax		
Year	Deficiency	Sec. *6653(b)(1)	Sec. 6653(b)(2)	Sec. 6661
1979	$ 83,726	$41,863	—	—
1980	$ 59,791	$29,896	—	—
1981	$ 90,839	$50,814	—	—
1982	$102,281	$51,140	50% of the interest due on $102,281	$25,570
1983	$102,496	$51,248	50% of the interest due on $102,496	$25,624
1984	$ 64,505	$32,252	50% of the interest due on $64,505	$16,126
1985	$123,403	$61,701	50% of the interest due on $123,403	$30,851

*For the taxable years 1979, 1980, 1981, this addition to tax is designated sec. 6653(b).

HOWARD A. DAWSON, JR.
Judge

Entered: Jun 27 1990

UNITED STATES TAX COURT
Washington, D.C. 20217

LEE ALEXANDER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 17429-88

ORDER and DECISION

Pursuant to the determination of the Court as set forth in its Memorandum Opinion (T.C. Memo. 1990-315) filed June 25, 1990, it is

ORDERED that respondent's motion for summary judgment filed on May 19, 1989, is hereby granted; and it is further

ORDERED AND DECIDED that there is a deficiency in and additions to petitioner's Federal income taxes as follows:

		Additions to Tax		
Year	**Deficiency**	**Sec. 6653(b)(1)(A)**	**Sec. 6653(b)(1)(B)**	**Sec. 6661**
1986	$ 40,640	$30,480	50% of the interest due on $40,640	$10,160

HOWARD A. DAWSON, JR.
Judge

Entered: Jun 27 1990

B1

Opinion of The United States Court of Appeals for the Second Circuit (Alexander I)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1040—August Term, 1990

(Argued: February 13, 1991

Decided: February 15, 1991)

Docket No. 90-4126

LEE ALEXANDER,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Before:

Pierce, Winter and Walker, *Circuit Judges.*

Appeal from entry of summary judgment by the United States Tax Court (Howard A. Dawson, *Judge*) in favor of the Commissioner based on appellant's failure to answer requests for admission.

Affirmed.

HAROLD J. BOREANAZ, Buffalo, New York, *for Petitioner-Appellant.*

SHIRLEY D. PETERSON, Assistant Attorney General, United States Department of Justice, Washington, D.C. (Gary R. Allen, Ann B. Durney, Nancy G. Morgan, Tax Division, United States Department of Justice, Washington, D.C.), *for Respondent-Appellee.*

PER CURIAM:

Lee Alexander, who at all times pertinent to this appeal was incarcerated in a federal prison, appeals from the entry of summary judgment in favor of the Commissioner. On appeal, he argues that summary judgment was inappropriate because the Commissioner's requests for admissions should not have been deemed admitted for failure to respond. We disagree. Tax Court Rule 90(c) provides in pertinent part:

> Each matter [contained in a request for admission] is deemed admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the requesting party (1) a written answer specifically admitting or denying the matter

> involved in whole or in part, or asserting that it cannot be truthfully admitted or denied and setting forth in detail the reasons why this is so, or (2) an objection, stating in detail the reasons therefor.

Rules of Prac. & Proc. of the United States Tax Ct., 26 U.S.C. App., Rule 90(c) (1988). In his brief, Alexander claims that he "responded to [the Commissioner's] requests on at least three separate occasions." However, these purported responses were in part not on point, were wholly conclusory and unsworn when on point, and all occurred well after the expiration of the thirty-day period for responding to the Commissioner's requests.

On March 27, 1989, the Commissioner filed requests for admission, effecting service on Alexander's counsel by certified mail. No response was made within the thirty-day period. Nor were objections made to the requests or an extension sought. Seven weeks later, on May 19, Alexander's counsel sought and later received a trial date continuance. Alexander now argues that the Commissioner was, at the time the continuance was sought, "aware that appellant was inaccessible to his counsel for purposes of trial" and "surely aware that the discovery requests would also be delayed for this same reason." The Commissioner may well have been aware that Alexander was incarcerated in a federal prison, but whether or why the Commissioner was aware that discovery could not proceed is hardly obvious. Moreover, the seeking of a continuance of the trial date is hardly a substitute for failing to respond to the requests for admissions weeks before.

On May 19, the Commissioner moved for summary judgment on the grounds that the requests for admission were deemed admitted, and that no material facts were disputed. On July 10, Alexander moved for a continuance of the summary judgment proceeding. Because the Commissioner's summary judgment motion rested on the failure to respond to the requests for admission, Alexander's counsel for the first time offered a reason for that failure, stating that, as a result of Alexander's incarceration and need for psychiatric care, counsel was having difficulty obtaining the information needed to answer the Commissioner's requests. In the same papers, Alexander sought, also for the first time, "additional time to respond" to the requests. Finally, on August 14, Alexander's counsel filed opposing papers in the summary judgment proceeding, offering the same explanation for the failure to respond to the requests for admission. Appended to these papers were handwritten documents, labeled "In Haste," purporting to be drafts of responses to some of the requests for admissions. The papers stated that these documents were written by appellant to assist counsel and contained some of the information needed for counsel to defend the case.

Counsel did not, however, move to withdraw or modify the admitted matters under Tax Court Rule 90(f). Rule 90(f) states in pertinent part:

> Any matter admitted under this Rule is conclusively established unless the Court *on motion* permits withdrawal or modification. . . . [W]ithdrawal or modification may be permitted when the presentation of the merits of the case will be subserved thereby, and the party who obtained the admission fails to satisfy the Court that the withdrawal or modification will prejudice him in prosecuting his case or defense on the merits.

(Emphasis added). Under this rule, Alexander's counsel could have sought from the Tax Court precisely the balancing of equities he now seeks on appeal. Such a motion would also have occasioned the making of a record as to what efforts to respond to the requests had been made and why they had failed, matters that were not illumined by counsel's unsworn and conclusory statements in the opposition to the motion for summary judgment.

We therefore believe the Tax Court acted within its discretion in deeming the matters in the unanswered requests for admission to be admitted and in granting the motion for summary judgment. It is not the role of appellate courts to make allowances for the patent disregard of clearly stated trial court rules that are in part designed to provide for the expeditious conclusion of litigation. Moreover, although Alexander's incarceration or medical care might have been regarded as cause for some delay upon a proper motion, counsel's belated, unsworn and conclusory assertions failed to detail the efforts made to respond to the requests and why they failed. There was, therefore, no evidentiary basis for believing that Alexander had been unable to comply with Tax Court Rule 90(c) in a a timely fashion. According, the tax Court followed its own unambiguous rule regarding requests for admission.

Affirmed.

C1

Opinion of the United States Tax Court Denying Motion to Vacate Judgment Above

UNITED STATES TAX COURT
Washington, D.C. 20217

LEE ALEXANDER,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Dockets Nos. 17429-88
17431-88

ORDER

On April 30, 1991, petitioner filed a motion for leave to file a motion to vacate the decisions entered herein on June 27, 1990, along with a proposed motion to vacate the decision and a memorandum of law in support thereof. Petitioner also filed on the same date a motion for leave to withdraw Harold Boreanaz as his counsel in these cases.

The entry of decisions herein granting summary judgment in favor of respondent was appealed by petitioner and the decisions of this Court were affirmed *per curiam* by the United States Court of Appeals for the Second Circuit on February 15, 1991. Therefore, after consideration of petitioner's motion, it is

ORDERED:

1. That petitioner's motion for leave to file the motion to vacate the decisions entered in these cases on June 27, 1990, is denied.

2. That petitioner's motion for leave to withdraw Harold Boreanaz as his counsel herein is denied.

HOWARD A. DAWSON, JR.
Judge

Dated: Washington, D.C.
May 23, 1991

D1

Opinion of the United States Court of Appeals for the Second Circuit (Alexander II)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City and County of New York, on the 30th day of January, one thousand nine hundred and ninety-two.

Present:

Honorable Frank X. Altimari,
Honorable John M. Walker, Jr.,
Honorable Joseph M. McLaughlin,
Circuit Judges.

LEE ALEXANDER,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

No. 91-4133

Petitioner-appellant Lee Alexander appeals an order of the Tax Court (Dawson, J.) denying Alexander's motion for leave

to file a motion to vacate a judgment of the Tax Court entered on June 27, 1990.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the said order of the Tax Court be and hereby is AFFIRMED.

Following Alexander's conviction in 1988 for, among other things, federal income tax evasion, the Commissioner served him with deficiency notices for tax years 1979 through 1986. Alexander challenged these deficiency notices in the Tax Court. Ultimately, the Tax Court granted summary judgment in favor of the Commissioner based upon facts deemed admitted by Alexander because of his failure to respond to the Commissioner's requests for admissions. *See* Rules of Prac. & Proc. of the United States Tax Ct., 26 U.S.C. app., Rule 90(c) (1988). This Court affirmed the Tax Court's entry of summary judgment in favor of the Commissioner. *See Alexander v. Commissioner*, 926 F.2d 197 (2d Cir. 1991) (per curiam). Alexander, who has been incarcerated at all times relevant to this appeal, was represented in these proceedings by Harold Boreanaz.

Alexander, appearing *pro se*, subsequently moved the Tax Court for leave to file a motion to vacate the judgment in favor of the Commissioner. Alexander alleged that, unbeknownst to him, Boreanaz had failed to object or respond to the Commissioner's requests for admissions. Alexander claims that Boreanaz's gross negligence in not timely responding to the Commissioner's requests for admissions justified vacatur of the Tax Court's judgment in favor of the Commissioner and that it was error for the Tax Court to deny his motion for leave to move for vacatur of the Tax Court's judgment.

Alexander makes no allegations of fraud on the Tax Court. *See Senate Realty Corp. v. Commissioner*, 511 F.2d 929, 931 & n.1 (2d Cir. 1975) (Tax Court may vacate a final judgment where it was procured through fraud). At most, Alexander has alleged that he was deceived or defrauded by his counsel

Boreanaz. *Cf. Monjar v. Commissioner,* 140 F.2d 263, 265 (2d Cir. 1944) (no jurisdiction in Tax Court to vacate default judgment despite "unfortunate reliance of the taxpayer upon counsel"). Moreover, Alexander's allegations in support of his motion were unsubstantiated. Finally, Alexander's motion was untimely. *See* Rules of Prac. & Proc. of the United States Tax Ct., 26 U.S.C. app., Rule 162 (1988). Under these circumstances, the Tax Court was well within its discretion in denying Alexander's motion. *See Senate Realty,* 511 F.2d at 931.

We have considered appellant's remaining arguments and find them to be without merit.

AFFIRMED.

HON. FRANK X. ALTMARI, U.S.C.J.

HON. JOHN A. WALKER, JR., U.S.C.J.

HON. JOSEPH M. McLAUGHLIN, U.S.C.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT

Filed Jan. 30, 1992
Elaine B. Goldsmith, Clerk
United States Court of Appeals
Second Circuit

E1

Order of the United States Court of Appeals for the Second Circuit denying a Suggestion for Rehearing *en banc*.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the third day of April, one thousand nine hundred and ninety-two.

LEE ALEXANDER,

Petitioner-Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

Docket Number 91-4133

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by petitioner-appellant Lee Alexander.

Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

Filed Apr 3 1992
Elaine B. Goldsmith, Clerk
United States Court of Appeals
Second Circuit

STATUTES.

§6213. Restrictions applicable to deficiencies petition to Tax Court.

(a) Time for filing petition and restriction on assessment — Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not, counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in sections 6851, 6852 or 6861, no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapters 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction to enjoin any action or proceeding under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition.

Internal Revenue Code of 1954 (26 U.S.C. 6501)

§ 6501. Limitations on assessment and collection

(a) General rule.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if

the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

§ 7442. Jurisdiction

The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3, and 4 of the Internal Revenue Code of 1939, by title II and title III of the Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926.

(Aug. 16, 1954, c. 736, 68A Stat. 879.)

Judiciary and Judicial Procedure (28 U.S.C. 1254)

28 § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(i) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Internal Revenue Code of 1954 (26 U.S.C.)

I.R.C. 7481. DATE WHEN TAX COURT DECISION BECOMES FINAL

(a) Reviewable Decisions.—Except as provided in subsections (b), (c), and (d), the decision of the Tax Court shall become final—

(1) Timely notice of appeal not filed.—Upon expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time; or

(2) Decision affirmed or appeal dismissed.—

(A) Petition for certiorari not filed on time.—Upon the expiration of the time allowed for filing a petition for certiorari, if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals and no petition for certiorari has been duly filed; or

(B) Petition for certiorari denied.—Upon the denial of a petition for certiorari if the decision of the Tax Court has been affirmed or the appeal dismissed by the United States Court of Appeals; or

(C) After mandate of Supreme Court.—Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Tax Court be affirmed or the appeal dismissed.

(3) Decision modified or reversed.—

(A) Upon mandate of Supreme Court.—If the Supreme Court directs that the decision of the Tax Court be modified or reversed, the decision of the Tax Court rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Secretary or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected.

(B) Upon mandate of the Court of Appeals.—If the decision of the Tax Court is modified or reversed by the United States Court of Appeals, and if—

(i) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

(ii) the petition for certiorari has been denied, or

(iii) the decision of the United States Court of Appeals has been affirmed by the Supreme Court, then the decision of the Tax Court rendered in accordance with the mandate of the United States Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Tax Court was rendered, unless within such 30 days either the Secretary or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected.

(4) Rehearing.—If the Supreme Court orders a rehearing; or if the case is remanded by the United States Court of Appeals to the Tax Court for a rehearing, and if—

(A) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or

(B) the petition for certiorari has been denied, or

(C) the decision of the United States Court of Appeals has been affirmed by the Supreme Court,

then the decision of the Tax Court rendered upon such rehearing shall become final in the same manner as though no prior decision of the Tax Court has been rendered.

Internal Revenue Code of 1954 (26 U.S.C.)

26 § 7482

§ 7482. Courts of review

(a) Jurisdiction.—

(1) In general.—The United States Courts of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

(2) Interlocutory orders.—

(A) In general.—When any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order. Neither the application for nor the granting of an appeal under this paragraph shall stay proceedings in the Tax Court, unless a stay is ordered by a judge

of the Tax Court or by the United States Court of Appeals which has jurisdiction of the appeal or a judge of that court.

(B) Order treated as tax court decision.—For purposes of subsections (b) and (c), an order described in this paragraph shall be treated as a decision of the Tax Court.

(C) Venue for review of subsequent proceedings.—If a United States Court of Appeals permits an appeal to be taken from an order described in subparagraph (A), except as provided in subsection (b)(2), any subsequent review of the decision of the Tax Court in the proceeding shall be made by such Court of Appeals.

(3) Certain orders entered under section 6213(a).—An order of the Tax Court which is entered under authority of section 6213(a) and which resolves a proceeding to restrain assessment or collection shall be treated as a decision of the Tax Court for purposes of this section and shall be subject to the same review by the United States Court of Appeals as a similar order of a district court.

(b) Venue.—

(1) In general.—Except as otherwise provided in paragraphs (2) and (3), such decisions may be reviewed by the United States court of appeals for the circuit in which is located—

(A) in the case of a petitioner seeking redetermination of tax liability other than a corporation, the legal residence of the petitioner,

(B) in the case of a corporation seeking redetermination of tax liability, the principal place of business or principal office or agency of the corporation, or, if it has not principal place of business or principal office or agency in any judicial circuit, then the office to which was made the return of the tax in respect of which the liability arises,

(C) in the case of a person seeking a declaratory decision under section 7476, the principal place of business, or principal office or agency of the employer,

(D) in the case of the organization seeking a declaratory decision under section 7428, the principal office or agency of the organization, or

(E) in the case of a petition under section 6226 or 6228(a), the principal place of business of the partnership.

If for any reason no subparagraph of the preceding sentence applies, then such decisions may be reviewed by the Court of Appeals for the District of Columbia. For purposes of this paragraph, the legal residence, principal place of business, or principal office or agency referred to herein shall be determined as of the time the petition seeking redetermination of tax liability was filed with the Tax Court or as of the time the petition seeking a declaratory decision under section 7428 or 7476, or the petition under section 6226 or 6228(a), was filed with the Tax Court.

(2) By agreement.—Notwithstanding the provisions of paragraph (1), such decisions may be reviewed by any United States Court of Appeals which may be designated by the Secretary and the taxpayer by stipulation in writing.

(3) Declaratory Judgment actions relating to status of certain governmental obligations.—In the case of any decision of the Tax Court in a proceeding under section 7478, such decision may only be reviewed by the Court of Appeals for the District of Columbia.

(c) Powers.—

(1) To affirm, modify, or reverse.—Upon such review, such courts shall have power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision of the Tax Court, with or without remanding the case for a rehearing, as justice may require.

(2) To make rules.—Rules for review of decisions of the Tax Court shall be those prescribed by the Supreme Court under section 2072 of title 28 of the United States Code.

(3) To require additional security.—Nothing in section 7483 shall be construed as relieving the petitioner from making or filing such undertakings as the court may require as a condition of or in connection with the review.

(4) To impose penalties.—The United Court of Appeals and the Supreme Court shall have the power to require the taxpayer to pay to the United States a penalty in any case where the decision of the Tax Court is affirmed and it appears that the appeal was instituted or maintained primarily for delay or that the taxpayer's position in the appeal is frivolous or groundless.

The Tax Court Rules of Practice

Rule 24. Appearance and representation

(a) Appearance. (1) General. Counsel may enter an appearance either by subscribing the petition or other initial pleading or document in accordance with subparagraph (2) hereof, or thereafter by filing an entry of appearance in accordance with subparagraph (3) hereof.

(2) Appearance in Initial pleading. If (A) the petition or other paper initiating the participation of a party in a case is subscribed by counsel admitted to practice before the Court, and (B) such initial paper contains the mailing address and Tax Court bar number of counsel and other information required for entry of appearance (see subparagraph (3), then (C) that counsel shall be recognized as representing that party and no separate entry of appearance shall be necessary. Thereafter counsel shall be required to notify the Clerk of any changes in applicable information to the same extent as if counsel had filed a separate entry of appearance.

(3) Subsequent Appearance. Where counsel has not previously appeared, counsel shall file an entry of appearance in duplicate, signed by counsel individually, containing the name and docket number of the case, the name, mailing address, telephone number, and Tax Court bar number of counsel so appearing, and a statement that counsel is admitted to practice before the Court. A separate entry of appearance, in duplicate, shall be filed for each additional docket number in which counsel shall appear. The entry of appearance shall be substantially in the form set forth in Appendix I. The Clerk shall be given prompt written notice, filed in duplicate for each docket number, of any change in the foregoing information. An entry of appearance shall not be joined to or made part of a motion to withdraw as counsel.

(4) Counsel Not Admitted to Practice. No entry of appearance by counsel not admitted to practice before this Court will be effective until counsel shall have been admitted, but counsel may be recognized as counsel in a pending case to the extent admitted, but counsel may be recognized as counsel in a pending case to the extent permitted by the Court and then only where it appears that counsel can and will be promptly admitted. For the procedure for admission to practice before the Court, see Rule 200.

(b) Personal Representation Without Counsel. In the absence of appearance by counsel, a party will be deemed to appear on the party's own behalf. An individual party may represent himself or herself. A corporation or an unincorporated association may be represented by an authorized officer of the corporation or by an authorized member of the association. An estate or trust may be represented by a fiduciary thereof. Any such person shall state, in the initial pleading or other paper filed by or for the party, such person's name, address, and telephone number, and thereafter shall promptly notify the Clerk in writing, in duplicate for each docket number involving that party, of any change in that information.

(c) Withdrawal of Counsel. Counsel of record desiring to withdraw such counsel's appearance, or any party desiring to withdraw the appearance of counsel of record for such party, must file a motion with the Court requesting leave therefor, showing that prior notice of the motion has been given by such counsel to such counsel's client, or such party's counsel, as the case may be, and to each of the other parties to the case or their counsel, and stating whether there is any objection to the motion. A motion to withdraw as counsel and a motion to withdraw counsel shall each also state the then current mailing address and telephone number of the party in respect of whom or by whom the motion is filed. A motion to withdraw as counsel shall not be joined to or made part of an entry of

appearance. The Court may, in its discretion, deny such motion.

(d) Death of Counsel. If counsel of record dies, the Court shall be so notified, and other counsel may enter an appearance in accordance with this Rule.

Title IX

Admissions and Stipulations

Rule 90. Requests for Admission

[1](a) Scope and Time of Request: A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters which are not privileged and are relevant to the subject matter involved in the pending action, but only if such matters are set forth in the request and relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. However, the court expects the parties to attempt to attain the objectives of such a request through informal consultation or communication before utilizing the procedures provided in this Rule. Requests for admission must be commenced and completed within the same period provided in Rule 70(a)(2) for commencement and completion of discovery.

(b) The Request: The request may, without leave of court, be served by any party to a pending case. Each matter of which an admission is requested shall be separately set forth. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The party making the request shall

[1]The amendments are effective as of July 1, 1990.

serve a copy thereof on the other party, and shall file the original with proof of service with the Court.

[1](c) Response to Request: Each matter is deemed admitted unless, within 30 days after service of the request or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the requesting party (1) a written answer specifically admitting or denying the matter involved in whole or in part, or asserting that it cannot be truthfully admitted or denied and setting forth in detail the reasons why this is so, or (2) an objection, stating in detail the reasons therefor. The response shall be signed by the party or the party's counsel, and the original thereof, with proof of service on the other party, shall be filed with the Court. A denial shall fairly meet the substance of the requested administration, and, when good faith requires that a party qualify an answer or deny only a part of a matter, such party shall specify so much of it as is true and deny or qualify the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless such party states that such party has made reasonable inquiry and that the information known or readily obtainable by such party is insufficient to enable such party to admit or deny. A party who considers that a matter, of which an admission has been requested, presents a genuine issue for trial may not, on that ground alone, object to the request; such party may, subject to the provisions of paragraph (g) of this Rule, deny the matter or set forth reasons why such party cannot admit or deny it. An objection on the ground of relevance may be noted by any party but it is not to be regarded as just cause for refusal to admit or deny.

[1](d) Effect of Signature: (1) The signature of counsel or a party constitutes a certification that the signer has read the

[1]The amendments of subparagraph (1) are effective as of July 1, 1990.

request for admission or response or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry, it is (A) consistent with these Rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken, unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

(2) If a certification is made in violation of this Rule, the Court, upon motion or upon its own initiative, may impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable counsel's fees.

[1](e) Motion to Review: The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the Court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this Rule, then it may order either that the matter is admitted or that an amended answer be served. In lieu of any such order the Court may determine that final disposition of the request shall be made at some later time

[1]The amendments are effective as of July 1, 1990.

which may be more appropriate for disposing of the question involved.

[1](f) Effect of Admission: Any matter admitted under this Rule is conclusively established unless the Court on motion permits withdrawal or modification of the admission. Subject to any other orders made in the case by the Court, withdrawal or modification may be permitted when the presentation of the merits of the case will be subserved thereby, and the party who obtained the admission fails to satisfy the Court that the withdrawal or modification will prejudice such party in prosecuting such party's case or defense on the merits. Any admission made by a party under this Rule is for the purpose of the pending action only and is not an admission by such party for any other purpose, nor may it be used against such party in any other proceeding.

[1](g) Sanctions: If any party unjustifiably fails to admit the genuineness of any document or the truth of any matter as requested in accordance with this Rule, the party requesting the admission may apply to the court for an order imposing such sanction on the other party or the other party's counsel as the Court may find appropriate in the circumstances, including but not limited to the sanctions provided in Title X. The failure to admit may be found unjustifiable unless the Court finds that (1) the request was held objectionable pursuant to this Rule. or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to doubt the truth of the matter or the genuineness of the document in respect of which the admission was sought, or (4) there was other good reason for failure to admit.

(h) Other Applicable Rules: For Rules concerned with frequency and timing of requests for admission in relation to

[1]The amendments are effective as of July 1, 1990.

other procedures, supplementation of answers. effect of evasive or incomplete answers or responses, protective orders, and sanctions and enforcements, see Title X.

Rule 91. Stipulations for Trial

(a) Stipulations Required: (1) *General:* The parties are required to stipulate, to the fullest extent to which complete or qualified agreement can or fairly should be reached, all matters not privileged which are relevant to the pending case, regardless of whether such matters involve fact or opinion or the application of law to fact. Included in matters required to be stipulated are all facts, all documents and papers or contents or aspects thereof, and all evidence which fairly should not be in dispute. Where the truth or authenticity of facts or evidence claimed to be relevant by one party is not disputed, an objection on the ground of materiality or relevance may be noted by any other party but is not to be regarded as just cause for refusal to stipulate. The requirement of stipulation applies under this Rule without regard to where the burden of proof may lie with respect to the matters involved. Documents or papers or other exhibits annexed to or filed with the stipulation shall be considered to be part of the stipulation.

(2) *Stipulations to Be Comprehensive:* The fact that any matter may have been obtained through discovery or requests for admission or through any other authorized procedure is not grounds for omitting such matter from the stipulation. Such other procedures should be regarded as aids to stipulation, and matter obtained through them which is within the scope of subparagraph (1), must be set forth comprehensively in the stipulation, in logical order in the context of all other provisions of the stipulation.

(b) Form: Stipulations required under this Rule shall be in writing, signed by the parties thereto or by their counsel, and

shall observe the requirements of Rule 23 as to form and style of papers, except that the stipulation shall be filed with the Court in duplicate and only one set of exhibits shall be required. Documents or other papers, which are the subject of

* * *

The Tax Court Rules of Practice

Rule 161. Motion for reconsideration of findings or opinion

Any motion for reconsideration of an opinion or findings of fact, with or without a new or further trial, shall be filed within 30 days after a written opinion or the pages of the transcript that contain findings of fact or opinion stated orally pursuant to Rule 152 (or a written summary thereof) have been served, unless the Court shall otherwise permit.

Rule 162. Motion to vacate or revise decision

Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit.

United States Code Annotated

Rules of Civil Procedure

for the

United States District Courts

Rule 60. Relief From Judgment or Order

* * *

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defend-

ant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Mar. 2, 1989, eff. Aug. 1, 1987.)

Supreme Court, U.S.
FILED
SEP 1 1992
OFFICE OF THE CLERK

No. 92-37

In the Supreme Court of the United States

OCTOBER TERM, 1992

LEE ALEXANDER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Tax Court's denial of a motion for leave to vacate a previously affirmed decision constitutes an abuse of discretion when there was no allegation of fraud on the court and the motion was both unsubstantiated and untimely.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-37

LEE ALEXANDER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. D1-D3) and Tax Court (Pet. App. C1-C2) are unreported. The decision of the court of appeals is noted at 956 F.2d 1161 (Table).

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1992. A petition for rehearing was denied on April 3, 1992 (Pet. App. E1-E2). The petition for a writ of certiorari was filed on July 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was the mayor of Syracuse, New York, from January 1, 1970, through December 31, 1985. From 1979 through 1986, petitioner extorted funds and received money from persons wishing to do business with the City of Syracuse. The income that petitioner thus received was not reported on his federal income tax returns. Petitioner was indicted and pled guilty to income tax evasion (26 U. S. C. 7201) in connection with those returns (Pet. App. A4-A6).

2. The Commissioner asserted income tax deficiencies and additions to tax for fraud and for substantial understatements of income tax liability resulting from petitioner's unreported income during the years 1979 through 1986. Petitioner sought redetermination of the asserted deficiencies in the Tax Court. The Commissioner served petitioner with requests for admission under Rule 90 of the Tax Court's Rules. Petitioner failed to respond to those requests during the time allowed and also failed to request additional time within which to respond (Pet. App. A2-A4).

Based on the facts set forth in the unanswered requests for admission, the Commissioner moved for summary judgment in the Tax Court. The court ruled that the facts contained in the requests for admission were conclusively established by petitioner's failure to answer or object. The court therefore upheld the deficiency determinations and additions to tax (Pet. App. A4, A6-A10).

The court of appeals affirmed (Pet. App. B1-B5). The court held that the Tax Court acted within its discretion in deeming the matters in the requests for admissions to be admitted and in granting the motion for summary judgment. The court emphasized that, if petitioner desired relief from the deemed admissions, the proper

course was to move the Tax Court for leave to withdraw or modify the admissions under Tax Court Rule 90(f), not to challenge them in the court of appeals (Pet. App. B4-B5).

3. Petitioner did not seek further review of that decision. Instead, 75 days after the judgment was entered by the court of appeals, petitioner moved the Tax Court to vacate the judgment (C. A. App. 117-127).[1] In support of that motion, petitioner claimed that his Tax Court counsel had misrepresented to petitioner that he had ample time to respond to the requests for admissions (*id.* at 120-121). Petitioner claimed that the alleged negligence of his counsel justified vacation of the Tax Court's prior decision (Pet. App. C1, D2).

4. The Tax Court denied petitioner's motion (Pet. App. C1-C2) and the court of appeals affirmed (*id.* at D1-D3). The court of appeals noted that petitioner had not alleged that any fraud had occurred in the Tax Court proceedings and, at most, claimed that he had been misled or deceived by his counsel (*id.* at D3). The court emphasized, moreover, that petitioner's allegations that his counsel had misled him were not substantiated (*ibid.*) and that the motion to vacate the judgment was untimely under the Tax Court rules (*ibid.*). In these circumstances, the court of appeals concluded that the Tax Court acted "well within its discretion in denying [petitioner's] motion" (*ibid.*).

ARGUMENT

The court of appeals correctly held that the Tax Court did not abuse its discretion in denying petitioner's motion to vacate its prior decision. This fact-specific decision does not conflict with any decision of this Court or

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[1] "C. A. App." refers to the joint appendix filed in the court of appeals.

of any other court of appeals. Further review is therefore not warranted.

1. As the court of appeals correctly observed (Pet. App. D2), petitioner did not allege that a fraud had been committed on the Tax Court. Absent such an allegation, the Tax Court lacked jurisdiction to vacate its prior final decision. See *Senate Realty Corp.* v. *Commissioner*, 511 F.2d 929, 931 (2d Cir. 1975).[2]

Fraud on the court is fraud that defiles the court itself or that renders the court incapable of impartially judging the case. 511 F.2d at 931. Gross neglect on the part of taxpayer's counsel does not constitute fraud on the court. See *Kenner* v. *Commissioner*, 387 F.2d 689, 692 (7th Cir. 1968) (that counsel failed to represent the taxpayer's interests vigorously, and took steps prejudicial to him, fails "to describe any fraud practiced upon the tax court"). See also *Heim* v. *Commissioner*, 872 F.2d 245, 248 (8th Cir. 1989); *Universal Film Exchanges, Inc.* v. *Lust*, 479 F.2d 573, 576-577 (4th Cir. 1973).

Since petitioner made no allegation that a fraud had been committed on the Tax Court, petitioner's motion to vacate the Tax Court judgment was properly denied. See *Bulloch* v. *United States*, 721 F.2d 713, 718 (10th Cir. 1983); *Anderson* v. *Commissioner*, 693 F.2d 844, 846 (9th Cir. 1979).[3]

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[2] Other circuits have held that the Tax Court may also vacate a final decision if the court concludes that it had no subject matter jurisdiction when the decision was first entered. See *Webbe* v. *Commissioner*, 902 F.2d 688, 689-(8th Cir. 1990); *Billingsley* v. *Commissioner*, 868 F.2d 1081 (9th Cir. 1989).

[3] Petitioner errs in asserting (Pet. 6-9) that the decision in this case conflicts with *Hanover Insurance Co.* v. *United States*, 880 F.2d 1503 (1st Cir. 1989). *Hanover Insurance* concerned the question of when a deficiency upheld by the Tax Court may be assessed and collected by the Commissioner. The court concluded that taxes may be assessed upon expiration of the time for filing a

2. The court of appeals also correctly concluded (Pet. App. D3) that petitioner's motion was untimely and unsubstantiated. Tax Court Rule 162 provides:

> Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit.

Petitioner filed his motion for leave to vacate on April 30, 1991, which was ten months after the Tax Court entered its decision on June 27, 1990, and 74 days after the court of appeals affirmed the Tax Court's decision. Since the motion was not filed within 30 days after entry of the decision, the Tax Court acted "well within its discretion" (Pet. App. D3) in denying the motion as untimely. This is especially so since no extraordinary circumstances were shown to justify the delay. See *Home Furniture Co.* v. *Commissioner*, 168 F.2d 312, 314 (4th Cir. 1948) (entertaining an untimely motion is within the grace of the court); *Regency Realty* v. *Commissioner*, 28 A.F.T.R.2d (P-H) 5420 (4th Cir. 1971).

Moreover, as the court of appeals emphasized (Pet. App. D3), the allegations upon which petitioner based his motion were unsubstantiated. Petitioner asserted that his counsel misrepresented that he had until August 11, 1989, to respond to the requests for admission. In support of that assertion, petitioner pointed to a letter from

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petition for certiorari from the decision of the court of appeals that affirmed the Tax Court decision. See *id.* at 1505.

Hanover Insurance does not address (or have relevance to) the question presented in this case, which concerns the scope of the discretion of the Tax Court to vacate a decision of that court that has been affirmed on appeal. Even when the time for certiorari has not expired, the judgment of the court of appeals is binding on the Tax Court (see 26 U.S.C. 7481(a)(2)) and may not be vacated by it except in the limited circumstances described in the text.

his counsel dated July 11, 1989 (C. A. App. 120-121, 126-127). But that letter did not make any misrepresentation to petitioner. The letter referred to the enclosed requests for admission, stated that the Tax Court rules allowed 30 days to respond, emphasized that additional time to respond would be needed and that petitioner should quickly reply to the letter to buttress any request to be made for additional time to respond (C. A. App. 126-127).[4]

Petitioner errs in claiming (Pet. 9-10) that the court of appeals lacked jurisdiction to decide that the motion was untimely or unsubstantiated because the Tax Court

[4] *United States* v. *Cirami*, 563 F.2d 26 (2d Cir. 1977), upon which petitioner relies (Pet. 10-12), is inapposite. That case involved an attorney's failure to respond to a motion for summary judgment. The Second Circuit initially affirmed the district court's denial of the motion to vacate the judgment, emphasizing that the defendants presented no evidence of the circumstances pertaining to their failure to respond to the government's motion. The Ciramis filed a second motion to vacate, submitting affidavits and evidence explaining the reasons for their counsel's failure to respond to the motion. The district court again denied their motion, but this time the Second Circuit reversed. Based on the new evidence, the court of appeals found "the possibly unique fact of what we may term the 'constructive disappearance' of defendants' attorney, who was allegedly suffering from a psychological disorder which led him to neglect almost completely his clients' business while at the same time assuring them that he was attending to it, and who had made himself unavailable even to the trial judge." 563 F.2d at 34. The court also noted (*id.* at 35) that the defendants did not themselves appear to have been neglectful.

Here, in contrast, petitioner has not submitted affidavits from his attorney demonstrating a similar abdication of his duties. Indeed, petitioner's attorney continued actively to participate in the case to its conclusion. Moreover, petitioner's counsel clearly advised him by letter of the time allowed to respond to the request for admissions and emphasized the importance of responding (or requesting additional time) promptly (C. A. App. 126-127).

did not deny the motion on these grounds. The court of appeals may affirm the judgment on any grounds available below. See *University Club* v. *City of New York*, 842 F.2d 37, 39 (2d Cir. 1988); *Furness Withy (Chartering), Inc., Panama* v. *World Energy Systems Associates, Inc.*, 772 F.2d 802, 808 (11th Cir. 1985) (citing *United States* v. *New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977)).[5]

3. Petitioner errs in asserting (Pet. 16-17) that the Tax Court should have imposed sanctions upon his attorney instead of penalizing petitioner by deeming the unanswered requests for admission to have been admitted. As this Court stated in *Link* v. *Wabash R.R.*, 370 U.S. 626, 633-634 (1962):

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

See also *Cine Forty-Second St. Theatre* v. *Allied Artists Pictures Corp.*, 602 F.2d 1062, 1067 (2d Cir. 1979); *United States* v. *Cirami*, 535 F.2d 736, 739 (2d Cir. 1976) (a client is not to be relieved of the "mistake or omission of his attorney by reason of the latter's ignorance of the law or of the rules of the court, or his inability to efficiently manage his caseload"); *Urban Elec. Supply & Equipment*

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[5] The courts of appeals have the same jurisdiction to review decisions of the Tax Court that they have for civil actions tried to district courts without a jury. 26 U.S.C. 7482(a); *Commissioner* v. *McCoy*, 484 U.S. 3, 6 (1987).

Corp. v. *New York Convention Ctr. Dev. Corp.*, 105 F.R.D. 92, 98 (E.D.N.Y. 1985).[6]

Petitioner errs in contending (Pet. 12-15) that the Tax Court should have held an evidentiary hearing prior to denying the motion for leave to vacate. The cases upon which he relies do not support his argument. Those cases involved the situation where the trial court imposed the harshest sanction available for an attorney's noncompliance with the court's rules—dismissal of the case.[7] The present case does not involve the imposition of sanctions. Instead, it involves the direct application

[6] Petitioner's reliance (Pet. 16-18) on *Carter* v. *Albert Einstein Medical Center*, 804 F.2d 805 (3d Cir. 1986), is misplaced. In that case, unlike the present case, the attorney's personal conduct was inexcusable because she "exhibited, on the record, blatant disregard for explicit orders." *Id.* at 806. Consequently, rather than the sanction of dismissal, the court of appeals directed the district court to reinstate the complaint and to impose sanctions on the attorney. *Ibid.*

[7] In *Hillig* v. *Commissioner*, 916 F.2d 171 (4th Cir. 1990), the Tax Court dismissed the case because of the attorney's failure to comply with various Tax Court rules. The Fourth Circuit vacated and remanded, stating that sanctions were justified against the attorney, but that imposing the severe sanction of dismissal was too harsh because it penalized the blameless taxpayers. Likewise, *Jackson* v. *Washington Monthly Co.*, 569 F.2d 119 (D.C. Cir. 1977), disapproved of the district court's dismissal with prejudice without a trial because that is a drastic sanction that is normally imposed only after unfruitful resort to lesser sanctions. *Id.* at 123. In *Fuller* v. *Quire*, 916 F.2d 358 (6th Cir. 1990), the district court was held to have acted within its discretion in reinstating a complaint under Fed. R. Civ. P. 60(b)(6) several years after the complaint had been dismissed for failure to prosecute. The court of appeals in *Crandall* v. *Commissioner*, 650 F.2d 659 (5th Cir. 1981), reversed and remanded for findings as to whether the Tax Court's dismissal of a *pro se* petition was justified under the circumstances.

of the Tax Court's "own unambiguous rule regarding requests for admission" (Pet. App. B5).[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1992

[8] Under Tax Court Rules 90(g) and 104(c)(4), the Commissioner could have requested sanctions for petitioner's failure to respond, including dismissal of the case, but he did not do so.

(3)

No. 92-37

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

LEE ALEXANDER,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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LEE ALEXANDER,

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-against-

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REPLY BRIEF

ARGUMENT

I

THE DOCTRINE OF "FRAUD UPON THE COURT" URGED BY THE COMMISSIONER UPON THIS COURT HAS NO APPLICATION TO THE INSTANT CASE

The Court of Appeals based its affirmation of the decision of the Tax Court upon two cases: Monjar v. Commissioner, and Senate Realty Corp. v. Commissioner. (Pet. App. D-4, D-5). Neither case is applicable to the instant case. In both cases the time to appeal had expired and the motions to vacate the decisions of the Tax Court were filed, in the case of Monjar, 11 years following the decision of the Tax Court, and in the case of Senate, 9 months. Thus, the decisions of the Tax Court had become final and the motions of the petitioners could not be entertained by the Tax Court except for

"fraud upon the court".

In the instant case, petitioner filed his motion with the Tax Court 15 days before his time to file a petition for certiorari to review the decision of the Court of Appeals had expired and before the decision of the Tax Court had become final. Thus his motion could be entertained by the Tax Court on grounds other than "fraud upon the court".

Petitioner's application to the Tax Court was based on matters not expressly or implicitly part of the decision of the Court of Appeals and hence was not barred by law-of-the-case.

II

THE DECISION OF THE TAX COURT WAS A LEGAL CONCLUSION AND NOT A DISCRETIONARY DECISION AS THE COURT OF APPEALS CONTENDED AND AS THE COMMISSIONER CONTENDS BEFORE THIS COURT

The Tax Court's denial of petitioner's Rule 162 motion was a legal conclusion by the Tax Court that its decision became "final" immediately following its affirmation by the Court of Appeals and thus unalterable, even though the time to petition for certiorari had not expired. The insistence by the Court of Appeals that only "fraud on the court" would empower the Tax Court to alter its decision expresses a like conclusion by the Court of Appeals. Yet the Court of Appeals reviewed the decision of the Tax Court as if it were an exercise of the Tax Court's discretion.

And the Commissioner also contends the same before this court. The Tax Court had, in fact, determined a question of law.

III

THE COURT OF APPEALS, AS DOES THE COMMISSIONER BEFORE THIS COURT, APPLIED THE WRONG STANDARD OF REVIEW TO THE DECISION OF THE TAX COURT

The applicable standard of review of the question of law presented by the decision of the Tax Court (supra) is a de novo standard of review, not the abuse of discretion standard applied by the Court of Appeals and urged upon this Court as correct, by the Commissioner. "This court applies a de novo standard of review to legal conclusions made by the Tax Court. Smith v. Commissioner, 937 F.2d 1089, 1096 (6th Cir. 1991)"

Proctor and Gamble Co. v. C.I.R., 961

F.2d 1255, 1258 (6th Cir. 1992)

"If on appeal [from the Tax Court] the court is asked to reconsider a question of law, the applicable standard is a de novo review. Helbering v. Tex-Penn Oil Co., 300 U.S. 481, 57 S.Ct. 569, 81 L.Ed. 755 (1937)"

Estate of Hall v. C.I.R., 967 F.2d 1437, 1438 (10th Cir. 1992)

"Some of our earlier decisions, however, appear to indicate that deference should be given to decisions of the Tax Court. In Vukasovich, Inc. v. Commissioner, 790 F.2d 1409, 1411-13 (9th Cir. 1986), we recognized the difficulty with some of our previous decisions and concluded that, in general, no special deference should be given the Tax Court when reviewing a pure question of law. See also Lynch v. Commissioner, 801 F.2d 1176, 1178-79 (9th

Cir. 1986) (no deference tax court's conclusions of law). This interpretation of our circuit's case law history was followed in Estate of Schnack, 848 F.2d at 935."

Pacific First Federal Savings Bank v. C.I.R., 961 F.2d 800, 803 (9th Cir. 1992).

IV

ISSUES OF "TIMELINESS" AND "SUBSTANTIATION" URGED UPON THIS COURT BY THE COMMISSIONER SHOULD INSTEAD BE ADDRESSED TO THE TAX COURT, WHICH HAD NOT ENTERTAINED THEM, LEAVING TO THIS COURT THE ISSUE OF LAW IN CONFLICT BETWEEN THE FIRST AND SECOND CIRCUITS OF THE COURTS OF APPEALS

""Uniformity among the circuits is especially important in tax cases to insure equal and certain administration of the tax system. We would therefore hesitate to reject the view of another circuit." First Charter Financial Corp. v. United

States, 690 F.2d 1342, 1345 (9th Cir. 1982)."

Pacific First Federal Savings Bank v. C.I.R., 961 F.2d 800, 803 (9th Cir. 1992)

V

THE COMMISSIONER ERRONEOUSLY ASSERTS TO THIS COURT THAT: "PETITIONER WAS INDICTED AND PLED GUILTY TO INCOME TAX EVASION (26 U.S.C. 7201) IN CONNECTION WITH THOSE RETURNS [1971-1985]"

Petitioner did not plead guilty to income tax evasion for the years 1979-1985 as the Commissioner's brief asserts at Page 2. Petitioner pled guilty to only the tax year 1985 (Pet. App. A4-A6). The petitioner did not plead guilty to any other year because the funds received during his tenure in office were collected for political campaigns and were not income

to this petitioner. In fact, they were a segregated fund maintained, by in large, by the fund raisers. None of the funds was spent for personal purposes, except for withdrawals for family support which petitioner's accountant regrettably masked as loans and for which this petitioner, per force, accepted responsibility and pled guilty to for the year 1985. At the time of his plea, petitioner delivered all of the funds collected to the government virtually intact.

The Commissioner argues the merits of the case to this court, overlooking the fact that petitioner has not been given the opportunity to contest the Commissioner's claim inasmuch as the Commissioner actively resists the petitioner's access to the Tax Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LEE ALEXANDER, Pro Se
Petitioner

September, 1992